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No. 88-924

Supreme Court, U.S.
FILED
FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN N. GRONDA, PETITIONER

v.

DON NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether, in a social security disability-benefits case, the Social Security Administration's Appeals Council may, consistent with 20 C.F.R. 404.969, review the entire decision by an administrative law judge (ALJ), and not merely those aspects appealed by the claimant, if the Appeals Council does not give notice to that effect within 60 days of the ALJ decision.

2. Whether substantial evidence supported the Appeals Council's decision that petitioner did not qualify for disability benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 856 F.2d 36. The order of the district court (Pet. App. B21-B22) and the Magistrate's Report and Recommendation (Pet. App. B1-B19) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on September 2, 1988. The petition for a writ of certiorari was filed on November 30, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 23, 1984, petitioner filed a claim for disability benefits under Title II of the Social Security Act,

42 U.S.C. 401 *et seq.* He alleged that pain in his right knee had become so severe that he had become unable to work beginning in 1980. Pet. App. B2. The Michigan Disability Determination Service arranged for petitioner to be examined by a physician, whose findings later led a vocational expert to conclude that petitioner could return to sedentary work. *Id.* at B14. The same conclusion was reached by a doctor who examined petitioner at the onset of the knee difficulties that led to his filing for benefits. *Id.* at B5. Based on that and other evidence, the state agency determined that petitioner's condition did not render him unable "to engage in any substantial gainful activity" under 42 U.S.C. 423(d)(1)(A). Tr. 77-78, 83-84.[1] Petitioner's claim for disability benefits was accordingly denied both initially and upon reconsideration. See Pet. App. A1-A2.

Petitioner appealed the state agency's determination to the Social Security Administration. On January 23, 1986, after a hearing, the administrative law judge (ALJ) found that petitioner did not become disabled in 1980. The ALJ found, however, that petitioner's difficulties with his back had rendered him disabled beginning April 4, 1985, and that petitioner was therefore entitled to benefits from that date. See Pet. App. A2, B3. Petitioner was notified that he had the right to ask the Appeals Council to review the decision. Tr. 18.

On March 21, 1986, within 60 days of receiving the notice (see 20 C.F.R. 404.968(a)(1)), petitioner requested review of the ALJ decision by the Appeals Council pursuant to 20 C.F.R. 404.967. Tr. 16. Petitioner explained his disagreement with the ALJ decision: "The Judge determined I was not disabled until April, 1985. I was disabled

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[1] "Tr." refers to the administrative record.

prior to that date. Substantial evidence does not support the Judges [*sic*] determination. He did not follow the law. I am not appealing the decision that I am disabled after April, 1985." See Pet. App. A2. On August 18, 1986, the Appeals Council wrote to petitioner that his case had been reviewed pursuant to his request and that the Council had found no substantial evidence to support the ALJ's finding that petitioner was disabled at all. *Ibid.*; Tr. 13-15. The Council informed petitioner that he had 20 days within which he could submit any additional evidence or a further written statement as to the facts or the law. Tr. 14. Petitioner did not avail himself of the opportunity. Pet. App. A2. On October 17, 1986, the Appeals Council issued a decision reversing the ALJ's finding of disability, concluding that the evidence established that petitioner had not lost the ability to perform all substantial gainful activity for the required 12-month period because he could perform work of a light level of exertion. Tr. 9-10. That decision became the final decision of the Secretary. Pet. App. A2.

2. Petitioner brought suit under 42 U.S.C. 405(g) seeking review of the Secretary's decision. Petitioner contended that the Appeals Council was not authorized to review the ALJ's finding that he was disabled after April 4, 1985, because petitioner had not challenged that finding and the Appeals Council had not notified petitioner within 60 days of the ALJ's decision that it intended to review the entire case, as he argued the Council was required to do by 20 C.F.R. 404.969. Pet. App. B17.[2] Petitioner also con-

[2] Section 404.969, which is titled "Appeals Council initiates review," states: "Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address."

tended that no substantial evidence supported the Appeals Council's decision. *Id.* at B14.

The magistrate to whom the district court referred the case reviewed the medical evidence and concluded that substantial evidence supported the Appeals Council's decision that petitioner was not disabled within the meaning of the statute. Pet. App. B1-B17. The magistrate found support in the findings of petitioner's treating physicians, the findings of the Secretary's consulting physician, and the opinions of the vocational expert. Accordingly, the magistrate concluded that the Appeals Council's determination was within the "zone of choice" that is properly left to administrative authorities. *Id.* at B16-B17.

The magistrate also determined that the Appeals Council had acted within its authority in considering issues that were not specifically raised in petitioner's request for review. The magistrate relied on 20 C.F.R. 404.979, which governs the scope of Appeals Council review, and which states in pertinent part: "After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, * * * the Appeals Council will make a decision or remand the case to an administrative law judge. The Appeals Council may affirm, modify or reverse the hearing decision or it may adopt, modify or reject a recommended decision." Based on that regulation, the magistrate concluded that petitioner's decision to seek Appeals Council review supplied the Council with authority to review petitioner's entire case without providing petitioner additional notice of the issues to be considered. Pet. App. B18. The district court adopted the recommended decision of the magistrate on July 8, 1987, without additional elaboration. *Id.* at B20-B22.

3. The court of appeals affirmed. Pet. App. A1-A7. The court first rejected petitioner's argument that 20

C.F.R. 404.969 precluded Appeals Council review of the ALJ's finding of disability beginning April 4, 1985, because, petitioner said, he did not challenge that finding and the Council did not give notice that it would review the finding within 60 days of the ALJ decision. Noting the general rule "that agency interpretations of self-prescribed regulations are afforded a considerable presumption of validity" (Pet. App. A3), the court upheld the Secretary's view that Section 404.969 applies only when the Appeals Council, but not the claimant, has initiated Appeals Council review. The court explained that "the task of the Appeals Council is to ensure consistency of results in the benefits program" and that "there is no fundamental unfairness in the Appeals Council's practice." Pet. App. A5. Not only was petitioner "given the opportunity to submit new evidence and/or arguments," the court reasoned, but "[b]ecause the Council unquestionably has the power to review a decision on its own initiative, there is no unfairness implicit in" the Council's reviewing the entire decision on a more limited request for review. *Ibid.*

The court of appeals also held that substantial evidence supported the Secretary's decision that petitioner was not disabled. Pet. App. A5-A6. The court noted that the magistrate had analyzed all the evidence and recommended that the Appeals Council be affirmed. *Id.* at A5. And the court of appeals itself concluded that "[t]he record indicates that [petitioner's] knee and back problems did not prevent him from exerting himself to the extent necessary to perform light work, and that his subjective allegations of pain were disproportionate to his underlying condition." *Ibid.* Accordingly, the court held that petitioner was not entitled to disability benefits.

ARGUMENT

1. Petitioner's primary contention (Pet. 11-15) is that the Appeals Council violated 20 C.F.R. 404.969 by reviewing aspects of the ALJ decision not challenged by petitioner without notifying him of its intent do so within 60 days of the ALJ decision. The court of appeals correctly rejected that contention. Pet. App. A3-A5. Although the Third Circuit has taken a different view, review of the conflict by this Court is not warranted.

a. The Secretary's interpretation of his own regulation is entitled to substantial deference, especially where, as here, it has been consistently maintained. See, *e.g.*, *Mullins Coal Co.* v. *OWCP*, No. 86-327 (Dec. 14, 1987), slip op. 22-24; *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977). Here, the Secretary's interpretation of Section 404.969 is plainly reasonable. Nothing in the language of that regulation suggests that the Appeals Council may not review an entire ALJ decision when a *claimant* seeks limited review pursuant to Section 404.967. Indeed, as the title of Section 404.969 makes clear ("Appeals Council initiates review"), the regulation is addressed only to those cases in which the Council initiates review itself. It has no application where a claimant seeks review under Section 404.967.

This reading of Section 404.969 is entirely consistent with the role the regulations give to the Appeals Council—"to ensure consistency of results in the benefits program" (Pet. App. A5). Nothing in the regulations suggests that Appeals Council review is restricted by a claimant's raising of particular issues, let alone that a 60-day notice is required where the claimant has appealed the ALJ decision. In fact, Section 404.969, which expressly provides for Council-initiated review of ALJ decisions, makes clear that a claimant has no right of control over the finality of an ALJ decision. Moreover, related regulations confirm

that the Appeals Council may review an entire ALJ decision, regardless of what issues a claimant raises. See 20 C.F.R. 404.967 ("If you * * * [are] dissatisfied with the [ALJ's] hearing decision * * *, you may request that the Appeals Council review *that action.*" (emphasis added)), 404.976(a) ("[t]he Appeals Council *may* limit the issues it considers" (emphasis added)), 404.976(b) ("[t]he Appeals Council will consider all the evidence in the administrative law judge hearing record"). In this regulatory context, as the court of appeals explained (Pet. App. A5), petitioner was not somehow unfairly deprived of a vested right in the finality of the ALJ's disability determination.

Nor was there any unfair lack of notice or opportunity to be heard: petitioner had a full opportunity to defend the ALJ's disability finding before the Appeals Council. As the court of appeals held, petitioner has no grounds to object that his benefit application was denied without his having had the opportunity to submit any evidence or arguments he thought important. Pet. App. A5. After reaching an initial conclusion that the ALJ's decision awarding benefits was not supported by substantial evidence, the Council so notified petitioner and offered him the chance to make additional submissions before the Council came to a final decision. *Ibid.* "The essence of due process is the requirement that "a person in jeopardy of a serious loss [be given] notice of the case against him and an opportunity to meet it.' " *Mathews* v. *Eldridge,* 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) (brackets in original)). Petitioner was afforded the required notice and hearing.[3]

[3] In addition, 20 C.F.R. 404.973 provides: "When the Appeals Council decides to review a case, it shall mail a notice to all parties at their last known address stating the reasons for the review and the issues to be considered."

b. Petitioner correctly observes (Pet. 11) that the Seventh Circuit is in agreement with the Sixth Circuit with respect to Section 404.969. *DeLong* v. *Heckler,* 771 F.2d 266 (7th Cir. 1985). Petitioner argues that the Eleventh and Third Circuits, in *Kennedy* v. *Bowen,* 814 F.2d 1523 (11th Cir. 1987), and *Powell* v. *Heckler,* 789 F.2d 176 (3d Cir. 1986), have taken contrary positions. Pet. 11. With respect to the Eleventh Circuit, that suggestion is incorrect. As the court of appeals noted (Pet. App. A4), the *Kennedy* court did not rely on Section 404.969. Rather, the court ruled that Section 404.973 required notice of review of unchallenged issues. 814 F.2d at 1527-1528; see note 3, *supra*. Not only is Section 404.973 not at issue in the present case, but petitioner in fact received notice and an opportunity to be heard on the disability question.

The Third Circuit in *Powell* ruled that the Appeals Council could not review an entire ALJ decision when the claimant appealed only part of the decision unless the Council gave notice of its intent to do so within the 60-day period specified in Section 404.969. Although the *Powell* ruling conflicts with the decision of the court of appeals in the present case, that conflict does not warrant this Court's review. As the court of appeals in this case observed (Pet. App. A4), *Powell* rested heavily on the Third Circuit's view that claimants were entitled to receive clear notice that taking an appeal "may jeopardize an entire benefits award." *Powell*, 789 F.2d at 180. Since *Powell* was decided, the Secretary has modified the standard form notice that is sent to claimants when an ALJ decision is reached. The new notice expressly warns claimants that, if they take an appeal, the Appeals Council *will* review the entire case.[4] The Third Circuit may reconsider its *Powell* decision in light of the new notice. In any event, if a con-

[4] The notice states: "When you appeal, you request the Appeals Council to review the decision. If the Appeals Council grants your re-

flict persists, it is most appropriately resolved through the Secretary's own amendment of his regulations. Intervention by this Court is not called for.

2. Petitioner also contends (Pet. 16) that the court of appeals erred in finding, in agreement with the district court and the magistrate, that substantial evidence supports the Appeals Council's conclusion that petitioner was not "disabled" within the meaning of the Social Security Act. This narrow factual contention raises no issue warranting this Court's review. In any event, the decision of the court of appeals is correct. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971). Here, the record contains testimony from a physician and a vocational expert that petitioner could return to sedentary work. Pet. App. B5, B13-B14. Moreover, the doctor who treated petitioner's back problem noted that petitioner had experienced reduced discomfort after being fitted with a back brace. *Id.* at B12. That evidence amply supports the Appeals Council's conclusion that petitioner was not unable "to engage in any substantial gainful activity" (42 U.S.C. 423(d)(1)(A)).[5]

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quest, it will review the entire record in your case. It will review those parts of the decision which you think are wrong. It will also review those parts which you think are correct and may make them unfavorable or less favorable to you. You will receive a new decision."

[5] Petitioner suggests (Pet. 15) that it is the ALJ's, not the Appeals Council's, findings that are to be reviewed to determine whether they are supported by substantial evidence. 42 U.S.C. 405(g) makes clear, however, that courts are to uphold "[t]he findings of *the Secretary* as to any fact, if supported by substantial evidence"; and the Secretary has designated the Appeals Council to be his final arbiter of factual disputes. See 20 C.F.R. 404.900-404.996. Moreover, the overwhelming weight of authority—including, as petitioner concedes (Pet. 15),

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1989

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an *en banc* decision of the Sixth Circuit—supports the conclusion of the court below that findings of the Appeals Council and not findings of the ALJ deserve the full judicial respect afforded to a final decision of the Secretary. *Bauzo* v. *Bowen*, 803 F.2d 917, 920-922 (7th Cir. 1986); *Mullen* v. *Bowen*, 800 F.2d 535 (6th Cir. 1986); *Parker* v. *Bowen*, 788 F.2d 1512 (11th Cir. 1986); *Fierro* v. *Bowen*, 798 F.2d 1351, 1354 (10th Cir. 1986), cert. denied, 480 U.S. 945 (1987); *Berrios* v. *HHS*, 796 F.2d 574, 575 (1st Cir. 1986); *Deters* v. *HEW*, 789 F.2d 1181, 1184 (5th Cir. 1986); *Kellough* v. *Heckler*, 785 F.2d 1147 (4th Cir. 1986); *Razey* v. *Heckler*, 785 F.2d 1426, 1429 (9th Cir.), reh'g denied, 794 F.2d 1348 (1986); *Baker* v. *Heckler*, 730 F.2d 1147, 1149-1150 (8th Cir. 1984).

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699 00091